

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO

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DERRICK WHEATT, <i>et al.</i> ,	:	CASE NOS. 1:17-CV-377 &
	:	1:17-CV-611 (consolidated)
Plaintiffs,	:	
	:	
vs.	:	OPINION & ORDER
	:	[Resolving Doc. 396]
CITY OF EAST CLEVELAND, <i>et al.</i> ,	:	
	:	
Defendants.	:	

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JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

On November 15, 2018, Plaintiffs Derrick Wheatt, Laurese Glover, and Eugene Johnson won a jury verdict against Defendants Vincent Johnstone and Michael Perry.<sup>1</sup> Defendant Michael Perry later died on December 9, 2018.<sup>2</sup>

Plaintiffs now move to substitute Karen Perry, as Executor of Michael Perry's Estate, in place of Michael Perry.<sup>3</sup> Defendant City of East Cleveland opposes;<sup>4</sup> Plaintiffs reply.<sup>5</sup>

The Court grants Plaintiffs' motion because the requested substitution complies with the relevant Federal Rule of Civil Procedure requirements.

### I. Legal Standard

If a party dies and the claim is not extinguished, the Court may order substitution of the proper party.<sup>6</sup> After the filing and service of a death notice, any party or the decedent's successor or representative may move for substitution.<sup>7</sup> If the motion is not made within

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<sup>1</sup> Doc. 359.

<sup>2</sup> Doc. 393.

<sup>3</sup> Doc. 396.

<sup>4</sup> Doc. 398; Doc. 401.

<sup>5</sup> Doc. 399.

<sup>6</sup> Fed. R. Civ. P. 25(a)(1).

<sup>7</sup> Fed. R. Civ. P. 25(a).

90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.<sup>8</sup>

Rule 25(a) requires two affirmative steps to trigger the running of the 90-day deadline for the substitution motion.<sup>9</sup> First, a death notice must be made upon the record.<sup>10</sup> Second, the death notice must be served upon the parties, as provided in Rule 5, and upon nonparties, as provided in Rule 4.<sup>11</sup>

## II. Analysis

Plaintiffs' motion complies with the Rule 25(a) procedural requirements. Plaintiffs filed the death notice on July 9, 2019.<sup>12</sup> Plaintiffs served the notice on all Parties in accordance with Rule 5 and on nonparty Karen Perry in accordance with Rule 4.<sup>13</sup> Within 90 days of filing and serving the notice, Plaintiffs moved for substitution.<sup>14</sup>

Defendant East Cleveland argues that Plaintiffs' motion to substitute should be denied as untimely. It contends that the 90-day deadline commenced December 19, 2018, when East Cleveland referenced Perry's death in a court filing.<sup>15</sup>

Defendant's argument is unpersuasive. As described above, Rule 25 gives the 90-day deadline triggering requirements. A notice must be (1) filed with the court and (2) served on all parties in accordance with Rule 5 and on all nonparties in accordance

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<sup>8</sup> *Id.*

<sup>9</sup> *Lawson v. Cty. of Wayne*, No. 11-11163, 2012 WL 5258216, at \*4-5 (E.D. Mich. Oct. 23, 2012).

<sup>10</sup> Fed. R. Civ. P. 25(a)(3); *Golden Gate Nat'l Senior Care, LLC v. Slaven*, No. CV 5:17-161-KKC, 2018 WL 1474072, at \*4 (E.D. Ky. Mar. 26, 2018).

<sup>11</sup> Fed. R. Civ. P. 25(a)(3); *Golden Gate Nat'l Senior Care*, 2018 WL 1474072, at \*4.

<sup>12</sup> Doc. 393.

<sup>13</sup> *See id.*

<sup>14</sup> Doc. 396.

<sup>15</sup> Doc. 401 (citing Doc. 374 at 2).

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with Rule 4.<sup>16</sup> Defendant's December 2018 reference to Michael Perry's death did not satisfy the service requirement and therefore did not trigger the 90-day deadline.

### III. Order

The Court **GRANTS** Plaintiffs' motion to substitute Karen Perry, as Executor of Michael Perry's Estate, as the Defendant in place of Michael Perry.

IT IS SO ORDERED.

Dated: October 22, 2019

s/ James S. Gwin  
JAMES S. GWIN  
UNITED STATES DISTRICT JUDGE

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<sup>16</sup> Fed. R. Civ. P. 25(a)(3); *Golden Gate Nat'l Senior Care*, 2018 WL 1474072, at \*4.